

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

**JOHNNY VEGAS, INC., an Illinois
Corporation,**

Plaintiff,

vs.

**CITY OF ALTON, ILLINOIS AND
JOHN DOES I-X¹,**

Defendants.

No. 04-CV-00931-DRH

MEMORANDUM AND ORDER

HERNDON, District Judge:

I. Introduction

On December 15, 2004, Plaintiff Johnny Vegas, Inc. (“Johnny Vegas”) filed its four-count complaint against the City of Alton, Illinois (“City of Alton”) and John Does I-X arising out of the City of Alton’s denial of a certificate of approval for a building where Johnny Vegas intends to operate its new store. Johnny Vegas plans to stock its new store with an assortment of merchandise including lingerie, swimwear, other clothing articles, shoes, oils, lotions and novelty items. **(Compl. at**

¹ John Does I-X are not listed in the case caption or on the docketing sheet. In the complaint, however, Johnny Vegas names as defendants “John Does I-X [who] are, and were at all times relevant to this action, City officials responsible for the issuance of a Certificate of Approval of an appearance plan pursuant to § 22-10-7 of the Alton City Code.” **(Doc. 1, Compl. at ¶ 12).**

¶ 24). Johnny Vegas alleges that its new store also plans to sell or rent presumptively protected First Amendment materials including videotapes, magazines, DVD's and books which depict and describe nude or partially clothed persons and/or sexual activity. (**Doc. 1, Compl. at ¶ 23**).

Now before the Court is Johnny Vegas's motion for preliminary injunction against the City of Alton pursuant to **FEDERAL RULE OF CIVIL PROCEDURE 65(a)**. (**Doc. 10**). Johnny Vegas requests the Court enjoin the City of Alton from using Title 2, Chapter 10 of the Alton City Code, entitled "Appearance Review Commission" and the Appearance Review Guidelines promulgated under the Code (collectively the "Appearance Review Process"), as a means of censorship to prevent the opening and operation of its business.² Johnny Vegas also requests the Court issue a preliminary injunction against the application to Johnny Vegas of Amended Ordinance No. 6834 defining "adult gift shop."

On February 24, 2005, the Court held an evidentiary hearing regarding Johnny Vegas's motion for preliminary injunction and took the matter under advisement. In accord with **FEDERAL RULES OF CIVIL PROCEDURE 65(d)** and **52(a)** the Court finds and concludes as follows.

²Specifically, Johnny Vegas brings an "as applied" challenge, not a facial challenge to the Appearance Review Process. An "as-applied" challenge consists of a challenge to a regulation's application only to the party before the court. **City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 758-59 (1988)**. If an as-applied challenge is successful, the statute may not be applied to the challenger, but is otherwise enforceable. **Id.**

II. Findings of Fact

A. Background

1. Johnny Vegas plans to open a new store at 1320 East Broadway, Alton, Illinois, called the “Johnny Vegas store” or “Johnny Vegas boutique”, which sells a limited quantity of adult merchandise, including marital aids, adult videos, DVD’s, and printed matter, that depicts nudity and refers to sexual behavior. The bulk of the inventory which the Johnny Vegas boutique plans to sell includes lingerie, swimwear, women’s shoes, but will include lotions, oils, games, and novelty items as well. **(Doc. 10, Ex. 1, Dec. 10, 2004 Aff. of John Haltom (“Haltom Aff.”) at ¶¶ 3, 5, 20; Doc. 38, Ex. 1, Dec. 14, 2004 Aff. of Cindy Miller at ¶¶ 3, 4).**³
2. The building intended to house the Johnny Vegas store is located in the Alton Downtown and Broadway Area Redevelopment District (the “Appearance Review Zone”).
3. The Johnny Vegas building is a free standing structure that is in close proximity to structures not in the Appearance Review Zone, including the brightly colored Alton Belle Casino, a car dealership and repair, and railroad tracks.
4. The building is currently boarded-up with plywood and empty because the Appearance Review Commission denied Johnny Vegas a certificate of

³Plaintiff contends that the proposed store in Alton, Illinois will carry similar inventory to the Doctor John’s store in Roy, Utah. **(Doc. 38).**

approval. **(Doc. 28, Feb. 5, 2005 Aff. of Bonnie Bolton (“Bolton Aff.”), first set of attached pictures).**

B. The Appearance Review Process

5. On April 12, 1978, the Alton City Council created the Appearance Review Commission. **(Doc. 25, Ex. 1, Alton City Code § 2-10-2).**
6. The Appearance Review Commission is a 7 member panel appointed by the Mayor by and with the advice and consent of the City Council. Each Commission Member serves a four-year term. **Alton City Code §§ 2-10-3, 2-10-4.**
7. The Alton City Code charged the Appearance Review Commission with creating a proposed appearance plan for the City of Alton for adoption by the City Council. **Alton City Code § 2-10-7.**
8. The Appearance Review Guidelines fulfill this mandate by “provid[ing] guidelines with standards by which community efforts may be channeled toward a common goal of improving and maintaining its visual appearance.” **(Doc. 25, Ex. 2, City of Alton Appearance Review Guidelines (“Appearance Review Guidelines”) at p. 1).**
9. Among other duties, the Appearance Review Commission has regulatory powers over exterior features of buildings and structures within the Appearance Review Zone. **Alton City Code § 2-10-10.**
10. The Appearance Review Commission utilizes the Appearance Review

Guidelines in the “review of proposed improvements by the public and private sector which includes streets, building, landscaping and other miscellaneous improvements.” **Appearance Review Guidelines at p. 1.**

11. Within the Appearance Review Zone, all permit applications for signs or for the erection, construction, alteration or repair of any building or structure involving an “exterior design feature”⁴ must gain the approval of the Appearance Review Commission or the Alton City Council in the form of a certificate of approval. **Alton City Code § 2-10-10.**
12. The Alton City Code provides that the Department of Public Works, after receipt of an application for permit, shall determine and advise the applicant whether a certificate of approval is required. **Alton City Code § 2-10-11.A.**
13. Any applicant or prospective applicant for a permit which may require a certificate of approval, may file a written request for a preliminary conference with the Appearance Review Commission. At the conference, the Commission shall give consideration to exterior drawings, sketches or photographic examples, landscapes and site plans and materials on a specific project, and

⁴An “exterior design feature” is defined as:

The general arrangement, scale and proportion of any building, portion of a building, sign or structure and includes the kind, color and texture of the building materials of such portion and the types and designs of roof, windows, doors, lights, attached or ground signs and other installations and fixtures pertinent to such portions as will be open to public view from any street, place or way.

Alton City Code § 2-10-1.

shall give the applicant its informal opinion to assist said prospective applicant in the development of a plan which would be considered with the requirements and purposes of the appearance plan. **Alton City Code § 2-10-11.B.**

14. Upon receipt of the application for a certificate of approval, the Commission shall schedule a meeting to be held within twenty-one (21) days and at such meeting the applicant shall be given a hearing on the application. At the hearing, the applicant shall provide the Commission with drawings which shall include plans and existing elevations, site plans, landscaping, and screening plans, rendering and specifications of signs, parking plans and the statement as to kind, color and texture of materials. The Commission shall make recommendations as to changes in the drawings, sketches, landscaping, site plan, materials and color, which, in the judgment of the Commission, would tend to effect the general purposes of the appearance plan. **Alton City Code § 2-10-11.C.1.**
15. After the hearing and considering the material presented, the Commission shall issue a certificate of approval if it finds that:

- a. The applicants' plans are substantially consistent with the appearance plan;
- b. The proposed exterior design features of the development are so compatible with the character of the applicable district building structures existing or which might be under construction and would contribute to the valuable environment of the City;

c. The exterior design features of the development will not be detrimental to the harmonious and orderly growth of the City; and

d. The exterior design features of the development will not cause any substantial depreciation in the property values or taxable values in the district.

Alton City Code § 2-10-11.C.2.

16. In the event the Commission denies the certificate of approval or fails to timely act, the Alton City Code provides for an appeal to the City Council. **Alton City Code § 2-10-13.**

17. The City Council shall consider and decide the appeal within two regular meetings after the filing of the appeal. **Alton City Code § 2-10-13.**

18. The City Council meets the second and fourth Wednesday of every month and holds committee meetings the second and fourth Monday of every month.

C. Johnny Vegas's Plans to Open a Store in Alton, Illinois

19. John V. Haltom ("Haltom") is the President and CEO of Johnny Vegas.

20. Haltom is affiliated with similar business operations in Iowa, Nebraska, Utah, and Missouri.

21. Haltom leased the building where he plans to open the Johnny Vegas store in Alton from a friend who purchased the building.

22. Before beginning renovation work Haltom testified that the building intended to house the Johnny Vegas boutique should have been demolished. He described the dilapidated condition of the building, including the fact that the

sewer line had been damaged and there was 6 inches of raw sewage along with rotten wood and metal in the basement. According to Haltom portions of the building were rotted out and some of the glass was broken.

23. On September 8, 2004 – shortly before Haltom arrived in Alton – the City Council of Alton “updated” its City Code by adding a new special use pertaining to adult orientated businesses and a new definition of adult gift shop.⁵ The new ordinance, called Amended Ordinance No. 6834, was approved by the Mayor of Alton the following day. The Amended Ordinance reads in pertinent part:

4-16-1

ADULT GIFT SHOP: A retail establishment meeting any of the following criteria:

(a) offers for sale or rental more than 25% of its total stock in trade any one or any combination of the following: sexual enhancement devices or sexual marital aids, erotically themed gifts or novelties, sexual toys, erotic massage aids and/or lubricants, or erotic media.

(b) more than 5% of its total public floor space is utilized for displaying any one or any combination of the following: sexual enhancement devices, sexual marital aids, erotically themed gifts or novelties, sexual toys, erotic massage aids and/or lubricants, or erotic media.

(Doc. 25, Ex. 6).

24. Haltom was asked to sign an Affidavit agreeing, among other things, to the

⁵According to Mayor Sandidge the amendment was created on the recommendation of an “attorney down south” who told the City Council its current ordinance was unsatisfactory and needed to be updated.

validity of Chapter 16 of Title 4 of the Alton City Code and that the Johnny Vegas store would not meet the definition of an adult gift shop as defined by Amended Ordinance No. 6834. (**Haltom Aff. at ¶ 12; Doc. 1, Ex. G**).

25. Haltom testified he had trouble getting a business application from the City. Haltom told the Court when he first arrived in Alton he went to the City Clerk's office to get a business application. (Haltom testified that it was the City Clerk's office, but in later testimony it was established that the Treasurer's office actually handles such matters.) According to Haltom, the City employees refused to give him a business license or a copy of Amended Ordinance No. 6834. He was told he would have to use the Freedom of Information Act to get a copy of the ordinance.
26. In the interim, Haltom began renovation on the building focusing on work that did not need permits such as painting and cleaning out the basement.
27. Haltom eventually received permits from the City for renovation of the interior of the building, including electrical and plumbing. In accord with these permits Haltom renovated the interior of the building and installed new plumbing. He also installed a new slate-stamped sidewalk in front of the building and added two new asphalt parking lots.
28. In addition, Haltom painted the outside of the building "pink"⁶ consistent with

⁶Both parties describe the building as "pink". Defense counsel even calls the building "bright pink." (**Doc. 25, Def.'s Mem. of Law in Opp. To Pl.'s Mot. For Preliminary Injunctive Relief at p. 3**). While the Court will accept the parties' representations, it strikes the Court that the Johnny Vegas building is not a very pink building.

the color scheme used at other affiliated stores.

29. Sometime during this time period Haltom was told by Doug Waggoner (“Waggoner”) of Building and Zoning that Waggoner *thought* the Johnny Vegas building was located within the Appearance Review Zone.
30. During this time Haltom also had a meeting with Mayor Sandidge where the Mayor described some of the obstacles Haltom faced in opening his business in Alton including the appearance review process and zoning for adult orientated businesses. According to the Mayor, Haltom assured him the Johnny Vegas store would not be an adult orientated business.
31. Mayor Sandidge was already aware of Haltom because he been given some materials off the internet from citizen’s groups opposed to the nature of Johnny Vegas’s business showing Haltom had been in trouble in Nebraska and Utah for similar business operations.
32. Several weeks after his arrival Haltom finally received a business application. According to Haltom the application directed prospective applicants within the Appearance Review Zone to enlist the assistance of the Alton Marketplace Association⁷ (“Alton Marketplace”) for design help. Haltom testified that this was the first actual notice that he was given that the Johnny Vegas building was within the Appearance Review Zone.

⁷The Alton Marketplace “is a community-based, not-for profit, volunteer organization dedicated to securing the economic vitality and aesthetic quality of the district.” (**Doc. 30, Feb. 15, 2005 Aff. of Nancy King at ¶ 2**).

33. Haltom complied with the instructions on the application and contacted the Alton Marketplace to help in the design of the facade for the Johnny Vegas store.
34. The Director of Alton Marketplace, Nancy King, called the Illinois Main Street Program⁸ and asked for assistance on behalf of Haltom.
35. Darius Bryjka (“Bryjka”), a project designer for the Illinois State Historic Preservation Agency assigned to the Illinois Main Street Program, agreed to come to Alton to assist with the project.
36. Bryjka and Haltom communicated a dozen or more times regarding the design of the Johnny Vegas store and Haltom revised his plans according to recommendations of Bryjka and his colleagues.
37. Bryjka sent a letter to King detailing his involvement in the project and concluding “we [at Illinois Main Street] are very pleased with the efforts that Mr. Haltom has made and that he accepted our input wherever possible. It was Mr. Haltom’s interest in the historic integrity of his building that led to our involvement and, consequently, to retention of historic material (upper story windows and masonry) and to storefront design that is more historically appropriate.” **(Doc. 32, Ex. B, Letter from Bryjka of Illinois Main Street to King of Alton Marketplace dated Oct. 25, 2004).**

⁸ Because the City of Alton is an Illinois Main Street Community it is entitled to design services from the Illinois Main Street Program. The Illinois Main Street Program is a statewide program involving 52 Illinois cities that operates out of the office of the Illinois Lieutenant Governor. **(King Aff. at ¶ 3).**

38. The Board of Alton Marketplace also expressed their pleasure with Haltom's cooperation and enthusiasm in working with a historic building in a letter to the Alton City Council, Mayor Sandidge and Alderman. (**Doc. 28, Ex. B, Letter from The Board of Alton Marketplace to Alton City Council, Mayor Sandidge and Alderman dated Oct. 20, 2004**).

D. The Appearance Review Process As Applied to Johnny Vegas

39. In early October Johnny Vegas applied for a certificate of approval for improvements to the facade of the building intended to house the Johnny Vegas store.
40. The Appearance Review Commission met three times to discuss Johnny Vegas's application.
41. Groups opposed to the nature of Johnny Vegas's business asked Mayor Sandidge to attend the appearance review meetings relating to the Johnny Vegas application for a certificate of approval. Mayor Sandidge had never attended an appearance review meeting in his 8 years as Mayor of the City of Alton.
42. The first meeting relating to Johnny Vegas's application was held on October 13, 2004.⁹ (**Joint Ex. 1, Minutes of Meeting dated Oct. 13, 2004**). According to the Minutes of Meeting Jack McDonald ("McDonald") of Midwest

⁹The parties did not submit to the Court a copy of the transcript of the October 13, 2004 meeting.

Sign Crafter & Electric Company of Lincoln, Nebraska was the only person to testify before the Commission on behalf of Johnny Vegas. (**Id.**) After questioning from the Commission Members and the audience, the Commission requested that McDonald provide more information regarding the actual color of the building/paint chips, photos of what the building would look like in the daytime and nighttime and copies of the Illinois Mainstreet and Illinois Historical Society documentation. (**Id.**) The meeting was laid over until October 27, 2004. (**Id.**)

43. The second meeting was held on October 27, 2004. (**Doc. 25, Ex. 4, Tr. of Appearance Review Commission Meeting dated Oct. 27, 2004 (“Oct. 27, 2004 Meeting Tr.”) & Joint Ex. 1, Minutes of Meeting dated Oct. 27, 2004).**
44. McDonald was called to testify again. He submitted two letters to the Commission. The first was from Bryjka of Illinois Main Street to King, Executive Director of Alton Marketplace, dated October 25, 2004 (**Doc. 30, Ex. C**); the second one was from the Board of Alton Marketplace to the Alton City Council, Mayor Sandidge and Alderman, dated October 20, 2004 (**Doc. 30, Ex. B**). Both letters detail Haltom’s cooperation and willingness to work to retain the historical integrity of the building.
45. McDonald told the Commission that he met with Waggoner of Building and Zoning after the first meeting. (**Oct. 27, 2004 Meeting Tr. at 9**). With the

input of Waggoner, McDonald submitted a revised plan to the Commission that eliminated all neon from the building. **(Oct. 27, 2004 Meeting Tr. at 13).**

46. King of the Alton Marketplace also testified at the second meeting. She told the Commission Members that Alton Marketplace Board's "position on this is strictly to do with the building. A building downtown has been saved. The Board considers the fact that he worked with the gentleman, Mr. Bryjka, from the Illinois Main Street, who gave him suggestions." **(Oct. 27, 2004 Meeting Tr. at 23).** She testified that "if someone else wanted to buy the building and move in there, it's perfect. It will be nice on the outside except for the color. All they need to do is paint it a different color. The building has been saved. The windows have been saved. The design of the building is as close to what you can do with a building that's deteriorating as it could be. And that's it." **(Oct. 27, 2004 Meeting Tr. at 24).**
47. Corporate Counselor James Schrempf ("Counselor Schrempf") asked that questions from the audience be limited to questions dealing with the appearance of the building. However, he did not limit the questions accordingly and many questions from the audience were directed at the nature of Johnny Vegas's business.
48. After her testimony, King was asked by Commission Member Mark Wuellner why the Board of the Alton Marketplace did not sign the October 20, 2004

letter from the group supporting Haltom's application. **(Oct. 27, 2004 Meeting Tr. at 25)**. She was also criticized for being "aggressive" in "push[ing] for this business to open" by Alderman Joe Maher a member of the Alton City Council. **(Oct. 27, 2004 Meeting Tr. at 26)**. In attempt to "clarify" Alderman Maher's question, one of the Board Members told King that the question was directed at the organization, not at her as an individual. **(Oct. 27, 2004 Meeting Tr. at 27)**.

49. Johnny Vegas's application was unanimously denied at the third meeting held on November 3, 2004. **(Doc. 25, Ex. 5, Tr. of Appearance Review Commission Meeting dated Nov. 3, 2004 ("Nov. 3, 2004 Meeting Tr.") & Joint Ex. 1, Minutes of Meeting dated Nov. 3, 2004)**.
50. At that meeting Bryjka testified before the Commission. Bryjka told the Commission he was approached by King and Haltom to help make the design of the Johnny Vegas storefront more historically appropriate. **(Nov. 3, 2004 Meeting Tr. at 4)**. Bryjka testified when he became involved the building was already painted and Haltom was in the process of removing the old deteriorated storefront and had some preliminary sketches and drawings. **(Nov. 3, 2004 Meeting Tr. at 4-5)**. He told the Commission as a result of the involvement of the Illinois Main Street Program Haltom agreed to retain the upper story double-hung windows, insert columns or balusters that are commonly found in historic storefronts, and to put in bulkheads under the

display windows with recessed panels. **(Nov. 3, 2004 Meeting Tr. at 5).**

When asked about the color of the building, Bryjka testified that “it was fine” given “paint color is a reversible change” and “it’s not a great loss to a historic building.” **(Nov. 3, 2004 Meeting Tr. at 6).** When asked by Counselor Schrempf whether Bryjka made suggestions that Haltom did not agree to do, Bryjka responded, “No, not really. He pretty much followed everything that we discussed.” **(Nov. 3, 2004 Meeting Tr. at 9).**

51. After Bryjka testified, Chairman Jacoby said it was unnecessary to have those in opposition of the application make statements as planned because the Commission Members had made written individual critiques on the plan presented. **(Nov. 3, 2004 Meeting Tr. at 14).** Chairman Jacoby then read a statement regarding the Commission’s feelings. He stated as follows:

In comparing the summaries, written summaries, there’s agreement there are several things about the proposal that do not meet the guidelines given to the Commission by the Alton City Council. A few of the items in contention by the Commission are following – these are mostly quotes directed from the guidelines.

The code shall provide guideline [sic] with standard by which community efforts may be channeled for the common goal of improving and maintaining its visual appearance. That’s on page one of the book.

Avoid garish patterns, textures or colors. It’s on page 11.

Storefront shall be designed with the largest possible window area which is keeping with the original opening. Emphasis shall be placed on display windows and entry doors, avoid introducing or change the location and size of

windows and doors, that all the original architectural and character of storefront. That's on page 11.

Building facade should conform with the range of color which are contended to give unity and historic connotations of the Alton Central Business District. On page 26.

To emphasize, the existing historic characteristics of Alton is a riverfront community and most especially to the rehabilitation of an existing facility. That's shown on page 2.

The level of complication shall be kept low. And that is in regard to signs. It's under the sign area as far as guidelines and [sic] concerns.

Materials not allowed are vacuum-formed plastic and internal illumination. That is regarding signs, again, and that's on page 33.

Okay. Regarding the facade. Building shall be rehabilitated in such a manner that the overall character and fullness of the original building are not eliminated. There are diagrams giving us guidance levels that would be expected in that particular guideline. That's on page 21.

This is just a few of the things that we were in agreement with – the Commission was in agreement with in their written summaries that they gave to me.

(Nov. 3, 2004 Meeting Tr. at 14-16).¹⁰

52. After reading the statement, Commission Member Wuellner made a motion to deny the applications, which was unanimously approved by the Commission

(Nov. 3, 2004 Meeting Tr. at 17).

¹⁰At the evidentiary hearing Johnny Vegas marked as Plaintiff's Exhibit 1 individual comments of the Commission Members. Johnny Vegas never introduced these comments into evidence.

53. The following exchanged then occurred between Chairman Jacoby and Haltom:

Chairman Jacoby: “We will be glad to work with you on a redesign for that if you meet the guidelines.”

Haltom: “[C]an we sit down and do it today?”

Chairman Jacoby: “Well, we have yet to get an architect sometime. I’m not – we aren’t drawers. But we have the guidelines to go by. If you come up with some ideas that would fit those, then I will --”

Haltom: “Well, I have the historical society here today.”

(Nov. 3, 2004 Meeting Tr. at 17).

54. Without responding to Haltom, Chairman Jacoby asked if a motion to adjourn the meeting had been made. **(Nov. 3, 2004 Meeting Tr. at 18).** Counselor Schrempf then advised Haltom of his appeal rights and the meeting was concluded. **(Nov. 3, 2004 Meeting Tr. at 18).**
55. During the evidentiary hearing, Haltom told the Court that after the meeting adjourned all the Commission Members got up and left. Counselor Schrempf and Phil Roggio (“Roggio”), the Director of Development and Housing, then escorted Haltom, King, and “the historical guys” to an office upstairs where the main point of contention was the color of the building. At the conclusion of this meeting, Roggio told Haltom that he would have to start over again and resubmit his application.
56. Haltom was never given any direction from the Appearance Review

Commission about how to comply with the Guidelines. The Commission never specified or suggested any colors to Haltom.

57. During the evidentiary hearing, the Court quoted the following passage from the Appearance Review Guidelines: “The existing CBD is characterized by the ‘inherent’ colors of the building facades. Use of similar ‘inherent’ colors is encouraged for major new construction and new infill construction as well.” **Appearance Review Guidelines at p. 26.** The Court asked Chairman Jacoby to explain what “inherent” color meant to the Commission. He could not explain it.
58. At the evidentiary hearing, Chairman Jacoby also told the Court he could not recall any other applicant being denied a certificate of approval because of color but remembered several instances in which applicants modified the color or changed the color after discussion of either what would be appropriate for a particular building or what would fit the Guidelines better.
59. On November 4, 2004, Johnny Vegas appealed the Commission’s denial of the certificate of approval to the City Council. **(Doc. 1, Ex. C, Letter from W. Andrew McCullough to the Alton City Council dated Nov. 4, 2004).**
60. On November 5, 2004, William L. Wheeler, Associate Director and Chief Counsel of the Illinois Historic Preservation Agency, sent an e-mail to Roggio as follows:

Mr. Roggio – Please be advised that we will be providing no additional services in relation to this building. We have

already worked with the owner and developed an acceptable project in terms of historic preservation. We do not dictate the color of building and certainly cannot do so if the color is existing as it was when we began to work with this owner.

If the City and the owner reach some agreement that would require changes in design, we will be happy to work with the owner at that time. We cannot however, commit our limited resources developing some hypothetical modification that may or may not meet City approval.

(Doc. 1, Ex. D)

61. On December 8, 2004, the City Council denied Plaintiff's appeal. **(Joint Ex. 1).**
62. According to Mayor Sandidge, the City Council had never heard another appeal from the Appearance Review Commission.

III. Conclusions of Law

A. Standard for Preliminary Injunction

63. In order to obtain a preliminary injunction, Johnny Vegas must show that: (1) it is reasonably likely to succeed on the merits; (2) it will suffer irreparable harm absent an injunction in that it would have an inadequate remedy at law; (3) it will suffer irreparable harm which, absent injunctive relief, outweighs the irreparable harm the City of Alton will suffer if the injunction is granted; and (4) the injunction will not harm the public interest. ***See Joelner v. Village of Washington Park, Illinois, 378 F.3d 613, 619 (7th Cir. 2004)(citing Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1067 (7th Cir. 1994));***

***see also MacDonald v. Chicago Park District*, 132 F.3d 355, 357 (7th Cir. 1997)(per curiam).**

64. “If the movant can meet this threshold burden, then the inquiry becomes a ‘sliding scale’ analysis where these factors are weighed against one another.” ***Joelner*, 378 F.3d at 619 (collecting cases).**
65. “When a party seeking a preliminary injunction on the basis of a potential First Amendment violation, the likelihood of success on the merits will often be the determinative factor.” ***Joelner*, 378 F.3d at 620 (citations omitted).**
66. “‘The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,’ *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and money damages are therefore inadequate, *Nat’l People’s Action*, 914 F.2d at 1013.” ***Joelner*, 378 F.3d at 620.**
67. Therefore, assuming Johnny Vegas can show a likelihood of success on the merits, the Court will balance the harms to the parties and the public interest. ***See Joelner*, 378 F.3d at 627-29.**

B. The Appearance Review Process as a Censorship Device

1. Likelihood of Success on the Merits

68. The Johnny Vegas boutique plans to sell sexually explicit material including printed matter, adult videos, and DVD’s that is protected by the First Amendment even though such material is oft regarded as “low value” speech.

***See City of Erie v. Pap's A.M.*, 529 U.S. 277, 294 (2000) (“[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate”)(emphasis added) (internal quotations omitted).**

69. The Ordinances implementing the Appearance Review Process are laws of general application that apply to all applicants seeking permits for signs or for the erection, construction, alteration, or repair of any building or structure involving an exterior design feature within the Appearance Review Zone. ***See City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 760-61 (1988).**
70. In most cases laws of general application carry little danger of censorship because they “are not aimed at conduct commonly associated with expression and do not permit licensing determinations to be made on the basis of ongoing expression or words about to be spoken.” ***City of Lakewood*, 486 U.S. at 760-61. Cf. *Tool Box v. Ogden City Corp.*, 355 F.3d 1236, 1242-43 (10th Cir. 2004)(en banc)(rejecting *facial* challenge to Protective Covenants finding they were a law of general application that carried little danger of censorship and suggesting the plaintiff should have brought an *as applied***

challenge).

71. However, there are situations in which a law of general application can be used as a means of censorship. The Supreme Court in **Lakewood** provided one example:

For example, a law requiring building permits is rarely effective as a means of censorship. To be sure, on rare occasion an opportunity for censorship will exist, such as when an unpopular newspaper seeks to build a new plant. But such laws provide too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse. And if such charges are made, the general application of the statute to areas unrelated to expression will provide the courts a yardstick with which to measure the licensor's occasional speech-related decision.

City of Lakewood, 486 U.S. at 761.

72. In this case the Court finds that Johnny Vegas has a likelihood of success in proving the Appearance Review Process was used as a censorship device to prevent Johnny Vegas from opening its unpopular business in Alton.
73. There is an abundance of evidence that Haltom was given the run around by Alton City officials. From the start it was intimated to Haltom his business was unwelcome in Alton. The Mayor of Alton met with Haltom to describe some of the obstacles, such as the appearance review process, Haltom would encounter in opening his store in Alton. Haltom also had trouble getting a business application and a copy of the new adult gift shop ordinance that was hurriedly passed by the City Council before Haltom's arrival. It was not until

several weeks after he arrived in Alton that Haltom finally received a business application, and learned the Johnny Vegas building was within the Appearance Review Zone, thus subject to the jurisdiction the Appearance Review Commission.

74. The evidence before the Court also shows that Haltom attempted to comply with the Appearance Review Guidelines. As instructed, Haltom enlisted the assistance of Alton Marketplace (and later Illinois Main Street) to help with the design for the Johnny Vegas store. Haltom readily accepted their suggestions and revised his plans for the Johnny Vegas store accordingly. Both community organizations were extremely pleased with Haltom's efforts to preserve the historical integrity of the building and expressed their favorable opinions to the Commission.
75. The Commission, however, was indifferent and dismissive of the opinions of the Alton Marketplace and Illinois Main Street. Moreover, after testifying in favor of the Johnny Vegas design, the Alton Marketplace representative was treated with hostility and accused of treating Haltom differently than other applicants and advocating his application with unusual vigor by a member of the Board of Alderman, participating in the meeting in a clear effort to demonstrate his bias to the Commission. Similarly, Bryjka of the Illinois Main Street Program was called to testify at the third meeting but Chairman Jacoby and the other Commission Members had already prepared their written

critiques disapproving of the Johnny Vegas design in advance of his testimony.

76. The Appearance Review Commission also seemed reluctant to work with Haltom. The Alton City Code specifically requires that the Commission make recommendations as to changes in drawings, sketches, landscaping, site plan, materials and color, which, in the judgment of the Commission, would tend to effect the general purposes of the appearance plan. **Alton City Code § 2-10-11.C.1.** In this case, Chairman Jacoby simply read a laundry list of quotes taken directly from the Appearance Review Guidelines without specifically advising how Plaintiff failed to meet the guidelines. The Commission then unanimously denied Johnny Vegas's application, without making any specific recommendations about how Haltom could comply with the Guidelines. In fact when Haltom asked for help on a redesign on the spot, Chairman Jacoby adjourned the meeting and all the Commission Members left. Haltom was then taken to a separate room and told he would have to start over again and resubmit an application.
77. Moreover, by summarily rejecting the Johnny Vegas design at the third meeting where Bryjka testified, the Appearance Review Commission seems to have failed to comply with **Alton City Code § 2-10-11.C.2** which requires the Commission *after* the hearing and *considering* the material presented to consider certain factors in determining whether to issue a certificate of

approval.

78. The Commission was also no doubt aware of the public hostility towards the Johnny Vegas store. At the second meeting the hearing officer made an ineffectual attempt to limit audience questions to the design of the Johnny Vegas building. Nevertheless, the audience was allowed to question Haltom about the nature of his business and Haltom was required to answer. In addition, for the first time in his tenure as mayor, Mayor Sandidge attended all three meetings at the behest of citizens opposed to Haltom's business.
79. There was also a great deal of discussion regarding the "pink" color of the building at the Appearance Review Meetings. Chairman Jacoby told the Court he could not recall another applicant being denied a certificate of approval because of color. At the evidentiary hearing, however, Chairman Jacoby downplayed the role of the color in effecting the Commission's decision.
80. What is more, the evidence shows Haltom had already dramatically improved the appearance of the building even without completing the facade by renovating the interior of the building, installing new sidewalks, and adding new parking lots in accord with the philosophy of the Appearance Review Guidelines.
81. Most importantly, however, there is no evidence that others similarly situated to Johnny Vegas encountered similar problems obtaining certificates of approval. The Meeting Minutes of the Appearance Review Commission

submitted by the parties as Joint Exhibit 1 show only one other sign failed to be approved by the Commission.¹¹ Indeed, the Meeting Minutes indicate most proposed improvements were passed by the Commission with little or no discussion. Mayor Sandidge also told the Court that the City Council had never heard another appeal from the Appearance Review Commission.

82. In sum, the evidence before the Court at this stage suggests that Johnny Vegas is reasonably likely to succeed in showing that the Appearance Review Process was used as a censorship device to prevent it from opening its unpopular business in Alton.

2. Balancing of the Harms to the Parties and Public Interest

83. As to Johnny Vegas's irreparable injury, as explained above, the Supreme Court has stated that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." ***Elrod*, 427 U.S. at 373.**

84. In addition, Johnny Vegas has already invested time and substantial sums of money in the rehabilitation of the building in Alton.

85. On the hand, the City of Alton has offered no evidence on the harm that would befall it if an injunction were put in place preventing it from enforcing the

¹¹The Court would certainly benefit from more evidence on this point. The Court does, however, recall a neon sign that was erected without the permission of the Appearance Review Commission, and subsequently approved by the Commission even though it did not comply with the Appearance Review Guidelines.

Appearance Review Process against Johnny Vegas. Indeed, the City has forfeited its chance to enforce the Appearance Review Process against Johnny Vegas by abusing its power to issue a certificate of approval.

86. While the Court certainly recognizes the potential harm the City of Alton would encounter if it were enjoined from enforcing the Appearance Review Process in toto, the Court's preliminary injunction will not cast such a wide net. ***See MacDonald*, 132 F.3d at 358 (vacating preliminary injunction because, among other things, "the injunction the court entered . . . prohibit[ed] further enforcement of the enjoined provisions as to any permit application addressed to 'First Amendment activities,' not simply to [plaintiffs] permit applications, reasoning "the injunction potentially prohibits [defendant] from collecting any application and user fees during the pendency of the case")**
87. Finally, the public interest weighs in favor of granting the injunction. ***See Newsom v. Albemarle County School Bd.*, 354 F.3d 249, 261 (4th Cir. 2003)("Surely, upholding constitutional rights serves the public interest"). *Cf. Homans v. Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001) ("[W]e believe that the public interest is better served by following binding Supreme Court precedent and protecting the core First Amendment right of political expression.").**
88. Accordingly, the Court finds the balance of harms weighs in favor of issuing the

injunction in favor of Johnny Vegas.

89. In short, the Court finds that a preliminary injunction should issue preventing the City of Alton from enforcing the ordinances related to the Appearance Review Process, specifically **Alton City Code, § 2-10-1, et seq.**, and the Appearance Guidelines promulgated under the Code, against Johnny Vegas.

C. Amended Ordinance No. 6834 Defining “Adult Gift Shop”

90. Johnny Vegas also asked the Court issue a preliminary injunction against the application to it of Amended Ordinance Number 6834. However, the Court declines to address the City’s application of Amended Ordinance 6834 at this time because there is no evidence that the City of Alton has applied the ordinance to Johnny Vegas.

IV. Conclusion

In conclusion, the Court **GRANTS in part** Johnny Vegas’s motion for a preliminary injunction and **ISSUES** a preliminary injunction prohibiting the City of Alton from enforcing the ordinances related to the Appearance Review Process, specifically **Alton City Code § 2-10-1, et seq.**, and the Appearance Review Guidelines, against Johnny Vegas. **(Doc. 10)**. The Court **DENIES without prejudice** Johnny Vegas’s motion for preliminary injunction in all other respects.

Finally, the Court **GRANTS** Johnny Vegas’s Motion to Strike Affidavit of Phil Roggio, but for different reasons than given by Johnny Vegas. **(Doc. 36)**. The affidavit is stricken because it was not timely submitted. It was intended to rebut the

testimony of John Haltom. Mr. Roggio was present in Court and was subject to being recalled to the witness stand for inquiry of the matters referred to in the affidavit. Thereafter, counsel for Johnny Vegas would have been in a position to cross-examine the witness, which he cannot do with the affidavit. Thus, this method of introducing evidence into the record immediately after the evidentiary hearing is inappropriate.

Pursuant to **FEDERAL RULE OF CIVIL PROCEDURE 65(c)** Johnny Vegas shall be required to post a bond of Three Thousand Dollars (\$3,000.00) to cover taxable costs in the event the City of Alton prevails.

IT IS SO ORDERED.

Signed this 10th day of March, 2005.

/s/ David RHerndon
United States District Judge